

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NATIVIDAD VASQUEZ

Claimant

VS.

MANPOWER

Respondent

AND

TRANSPORTATION INS. CO. and/or

NATIONAL FIRE INSURANCE CO.

Insurance Carrier

Docket No. 1,028,463

ORDER

STATEMENT OF THE CASE

Respondent and National Fire Insurance Company (National) requested review of the March 14, 2007, Order for Compensation entered by Administrative Law Judge Brad E. Avery. Conn Felix Sanchez, of Kansas City, Kansas, appeared for claimant. Terry J. Torline, of Wichita, Kansas, appeared for respondent and National. It is not clear whether Mr. Torline likewise represents Transportation Insurance Company (Transportation).

The record is the same as that considered by the ALJ and consists of the transcript of the May 26, 2006, Preliminary Hearing, including the exhibit; the transcript of the March 13, 2007, Motion Hearing, including the exhibits; together with the pleadings and correspondence contained in the administrative file.

The Administrative Law Judge (ALJ) ordered temporary total disability (TTD) benefits to be paid by "respondent and insurance carrier"¹ for a period commencing October 5, 2006, to February 22, 2007, at the rate of \$193.34 per week. The ALJ also imposed a penalty in the amount of \$50 per week from October 5, 2006, to February 22, 2007. The ALJ's order did not specify which insurance carrier was responsible for the

¹ ALJ's Order for Compensation (Mar. 14, 2007).

payment of the temporary total disability, but National was the only insurance carrier listed in the caption of the ALJ's Order for Compensation. The ALJ's order likewise did not specify whether respondent was liable for the penalties.

ISSUES

Respondent and National request that the Board reverse the ALJ's order assessing penalties, arguing that claimant failed to provide service of her Demand for Payment on the proper insurance carrier and failed to specify with particularity the amounts of compensation claimed to be unpaid and past due. The ALJ's award of temporary total disability compensation was not appealed.

Claimant contends that it is respondent's obligation to notify the proper insurance carrier of the claim, and if respondent had information that Transportation was its insurance carrier on the date or dates of accident alleged, then respondent did not present that information to the court or other parties in a timely manner. Claimant also argues that counsel for respondent had entered his appearance for both insurance carriers, therefore, service of claimant's demand on respondent's attorney constituted actual notice to both Transportation and National. Claimant also asserts that her demand for compensation was appropriate as it provided a start date, type of benefits not paid, and the gross amount past due. Accordingly, claimant requests that the Board affirm the Order for Compensation of the ALJ or, in the alternative, modify the order to increase the penalties to \$100 per week.

The issues for the Board's review are:

- (1) Did the ALJ order respondent and National to pay claimant TTD compensation?
- (2) If so, did respondent and National pay claimant the TTD compensation as ordered?
- (3) Was proper service of written demand made on respondent and National?
- (4) Was claimant's written demand sufficient to put respondent and its insurance carrier on notice of the compensation claimed to be unpaid and past due?
- (5) Should a civil penalty be assessed against the respondent and/or National and, if so, in what amount?

FINDINGS OF FACT

Claimant is claiming injuries to her bilateral upper extremities in a series of accidents to February 23, 2006. Her Application for Hearing, filed April 17, 2006, lists National as respondent's workers compensation insurance carrier. On April 19, 2006, claimant filed an Application for Preliminary Hearing. Notice of the filing of this Application was mailed

to National. An Entry of Appearance was filed by Timothy A. Emerson of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., on May 18, 2006, on behalf of the respondent and “its insurance carrier, National Fire Insurance Co.”² A preliminary hearing was held on May 26, 2006, at which time the ALJ announced the case as “Natividad Vasquez versus Manpower/National Fire Insurance.”³ Mr. Emerson announced his appearance on behalf of the “respondent and insurance carrier.”⁴ At that hearing, there was no mention by respondent’s counsel that National was not the proper insurance carrier for the accident dates being alleged by claimant.

On May 31, 2006, the ALJ ordered respondent and National to pay claimant TTD compensation at the rate of \$193.34 per week “until further order, or until certified as having reached maximum medical improvement; or released to regular job; or until returned to gainful employment, whichever occurs first.”⁵ On the same day, the ALJ issued an order referring claimant to Dr. Gary Baker for an independent medical examination, with the direction that Dr. Baker “render an opinion regarding what, if any, additional medical care is necessary to cure and relieve the effects of her work related injury of 2/23/06 to her upper extremities.”⁶

After rescheduling the independent medical examination at least two times because claimant failed to appear, the examination was performed on November 8, 2006. Claimant stated that she was unable to see Dr. Baker when she was originally scheduled because she had traveled to Mexico to be with her mother, who was very sick. Claimant’s counsel indicated that neither he nor claimant were given notice of the first two examination dates.⁷

Claimant filed a Demand for Payment on January 22, 2007, a copy of which was delivered to respondent’s attorney by certified mail and a copy was likewise sent by certified mail to the named insurance carrier, National. The parties’ receipt of these certified mailings was verified by the signed Return Receipt card for each being marked as exhibits to the Motion Hearing transcript.⁸ The Demand for Payment alleged that TTD benefits to claimant were past due in the amount of \$2,900.10, covering a period from October 5, 2006, to January 19, 2006. On February 12, 2007, claimant filed a Motion for

² Entry of Appearance (filed May 18, 2006) at 1.

³ P.H. Trans. (May 26, 2006) at 3.

⁴ *Id.*

⁵ ALJ’s Order for Compensation (May 31, 2006).

⁶ ALJ’s Order Referring Claimant for Independent Medical Evaluation (May 31, 2006) at 1.

⁷ Motion Hearing Trans., (Mar. 13, 2007) at 11.

⁸ Motion Hearing Trans., Cl. Ex. 2.

Civil Penalty & Attorney Fees, a copy of which was served on respondent's attorney and the named insurance carrier, National, by regular mail. Thereafter, in an unsigned form letter dated February 12, 2007, a representative of CNA Claims Service, P.O. Box 139046, Dallas, Texas, indicated: "We are not the W.C. carrier for the listed employer, or our coverage has expired and this will need to be forwarded to the new W.C. Carrier."⁹ In a letter dated March 7, 2007, the Division answered National Fire Ins. Co. of Hartford CNA, advising that the Division was "returning the Hearing Notice dated 2/13/07 to you along with a NCCI printout with the policy number & coverage period. For the date of accident you are the carrier." However, on March 7, 2007, a Notice of Hearing Amended Application to Add or Change Carrier was mailed by the Division to both National and Transportation, both of which share the same mailing address with CNA. The Division also mailed copies of that Notice of Hearing Amended Application to Add or Change Carrier to the ALJ, claimant's attorney, respondent, and respondent's attorney.

On February 21, 2007, Terry J. Torline of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., filed his Entry of Appearance and Substitution of Counsel, which stated Mr. Torline was entering his appearance as counsel for respondent and National. He signed the pleading as "attorneys for Respondent and Insurance Carrier."

A motion hearing was held on March 13, 2007. Claimant was asking for payment of TTD benefits in the amount of \$3,866.80 from October 5, 2006 until February 27, 2007. Claimant also requested penalties of \$100 per week. Respondent and National argued that TTD benefits were cut off based upon the insurance carrier's determination that accommodated employment was available to claimant. Respondent and National also argued for the first time that National was not respondent's insurance carrier and, therefore, claimant's notice of demand was sent to the wrong insurance carrier.

Claimant's last TTD check covered the period from September 29, 2006, through October 5, 2006. Claimant did not work after October 5, 2006, until she was reemployed by respondent a couple of weeks before the motion hearing. Claimant did not remember Dr. Baker releasing her to return to work. She agreed, however, that Dr. Baker said she was able to work if it was within her restrictions. She did not take a copy of Dr. Baker's report to respondent because she had tried earlier to call them but was unable to find anyone who could converse with her in Spanish. A copy of Dr. Baker's November 8, 2006, report was introduced at the March 13, 2007, hearing by counsel for respondent and National as Respondent's Exhibit A. It is file stamped "Received Nov. 15, 2006 Martin, Pringle."

On March 14, 2007, the ALJ issued his Order for Compensation granting claimant TTD compensation to be paid by respondent and National at the rate of \$193.34 per week

⁹ Letter from CNA Claims Service (Feb. 12, 2007), Division's administrative file.

from October 5, 2006, to February 22, 2007. The ALJ also ordered respondent and National to pay penalties in the amount of \$50 per week for the same time period.

PRINCIPLES OF LAW

An award of penalties under K.S.A. 44-512a is not a preliminary award, but instead is a final order.¹⁰ Therefore, the Board has jurisdiction to decide that issue at this state of the proceedings.

K.S.A. 44-512a(a) provides:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

In *Kelly*¹¹, the Kansas Supreme Court stated: "Service of a demand letter by certified mail constitutes substantial compliance with K.S.A. 1976 Supp. 44-512a."

ANALYSIS

The penalty statute requires service of written demand for payment to be made personally or by registered mail on the employer or the insurance carrier liable for such compensation and its attorney of record. Here, personal service was not given to any party, but there was service by certified mail made on the attorney of record for respondent and National, as well as on National separately. Service by certified mail satisfies the statute. The ALJ did not specify which parties were liable for the penalties in the same sentence as where he ordered penalties. But it is apparent from the four corners of the order that the ALJ intended it to be respondent and National. Claimant need not establish which insurance carrier was providing coverage to respondent on the date of accident

¹⁰ *Waln v. Clarkson Constr. Co.*, 18 Kan. App. 2d 729, Syl. ¶ 1, 861 P.2d 1355 (1993); *Stout v. Stixon Petroleum*, 17 Kan. App. 2d 195, 836 P.2d 1185, rev. denied 251 Kan. 942 (1992).

¹¹ *Kelly v. Phillips Petroleum Company*, 222 Kan. 347, Syl. ¶ 2, 566 P.2d 10 (1977).

because on May 31, 2006, the ALJ ordered respondent and National to pay claimant TTD benefits. The ALJ had jurisdiction over those parties. The ALJ's May 31, 2006, order was not appealed and neither respondent nor National sought modification of that order.

CONCLUSION

The Board finds service was proper. Claimant made proper service of her written demand for compensation on respondent through its attorney of record and on National and on National's attorney of record. The written demand sent to each set forth with particularity the TTD compensation claimed unpaid and past due. Thereafter, respondent and National failed or refused to make payment within 20 days from the date of service of such demand. The ALJ was correct to assess a civil penalty against respondent and National. The amount of the penalty assessed was one-half of the maximum penalty permitted. The Board finds this amount to be appropriate.

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Order for Compensation entered by Administrative Law Judge Brad E. Avery dated March 14, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and National Fire Insurance Co.
Transportation Insurance Co., CNA, P.O. Box 139046, Dallas, Texas, 75313-9011
Brad E. Avery, Administrative Law Judge